

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel.)
W.A. DREW EDMONDSON, in his capacity as)
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OKLAHOMA and OKLAHOMA SECRETARY)
OF THE ENVIRONMENT C. MILES TOLBERT,)
in his capacity as the TRUSTEE FOR)
NATURAL RESOURCES FOR THE)
STATE OF OKLAHOMA,)

Plaintiffs,)

v.)

05-CV-0329 TCK-SAJ

1. TYSON FOODS, INC.,)
2. TYSON POULTRY, INC.,)
3. TYSON CHICKEN, INC.,)
4. COBB-VANTRESS, INC.,)
5. AVIAGEN, INC.,)
6. CAL-MAINE FOODS, INC.,)
7. CAL-MAINE FARMS, INC.,)
8. CARGILL, INC.,)
9. CARGILL TURKEY PRODUCTION, LLC,)
10. GEORGE'S, INC.,)
11. GEORGE'S FARMS, INC.,)
12. PETERSON FARMS, INC.,)
13. SIMMONS FOODS, INC., and)
14. WILLOW BROOK FOODS, INC.,)

Defendants.)

CARGILL TURKEY PRODUCTION, LLC,)

Third Party Plaintiff,)

v.)

CITY OF WESTVILLE AND CITY OF)
TAHLEQUAH,)

Third Party Defendants,)

and)

TYSON FOODS, INC., TYSON POULTRY,)
INC., TYSON CHICKEN, INC.,)
COBB-VANTRESS, INC., GEORGE’S, INC.,)
GEORGE’S FARMS, INC., PETERSON FARMS,)
INC., SIMMONS FOODS, INC., AND)
WILLOW BROOK FOODS, INC.,)
)
Third Party Plaintiffs,)
)
v.)
)
CITY OF TAHLEQUAH, <i>ET AL.</i> ,)
)
Third Party Defendants.)

**CARGILL TURKEY PRODUCTION, LLC AND CARGILL, INC.’S
OPPOSED MOTION FOR LEAVE TO FILE AMENDED
THIRD PARTY COMPLAINT AND CROSS-CLAIMS**

Pursuant to Fed.R.Civ.P. 15(a), Defendant/Third Party Plaintiff Cargill Turkey Production, LLC (“CTP”) and Defendant Cargill, Inc. (“Cargill”) hereby move for leave to file the following proposed pleadings:

- 1) CTP’s First Amended Third Party Complaint against City of Tahlequah and City of Westville, (attached hereto as Exhibit “1”);
- 2) CTP’s First Amended Cross-Claim against City of Watts, Tahlequah Public Works Authority; Westville Utility Authority; Adair County; Cherokee County; Delaware County; and Sequoyah County (attached hereto as Exhibit “2”); and
- 3) Cargill’s First Amended Cross-Claim against City of Tahlequah, City of Westville, City of Watts, Tahlequah Public Works Authority; Westville Public Works Authority; Adair County, Oklahoma; Cherokee County, Oklahoma; Delaware County, Oklahoma; and Sequoyah County, Oklahoma (attached hereto as Exhibit “3”).

Plaintiffs oppose the granting of the relief requested.

To date, CTP and Cargill have asserted claims against City of Tahlequah; City of Westville; and City of Watts only (“Municipal Entities”). The proposed Amended Third Party Complaint and Amended Cross-Claims are necessary to amend the allegations against the Municipal Entities to eliminate the cause of action for indemnity and to clarify the bases for other previously asserted causes of action.

Currently pending before this Court is the Motion for Leave to File Amended Third Party Complaint filed by CTP and Cargill’s Co-Defendants/Third Party Plaintiffs¹, Docket # 816. CTP and Cargill’s claims against the Municipal Entities are substantively identical to the co-Defendants/Third Party Plaintiffs’ third-party claims against these entities. *See* Co-Defendants/Third Party Plaintiffs’ proposed Amended Third Party Complaint attached to their Motion for Leave, Dkt. #816.

Third Party Plaintiffs also seek leave to assert their third-party claims against various new parties including, but not limited to: Tahlequah Public Works Authority; Westville Utility Authority; Adair County, Oklahoma; Cherokee County, Oklahoma; Delaware County, Oklahoma; and Sequoyah County, Oklahoma (collectively referred to herein as “Additional Governmental Entities”). Should leave be granted to Third Party Plaintiffs to amend their Third Party Complaint to assert claims against the Additional Governmental Entities, then CTP and Cargill likewise seek leave to file cross-claims against these Additional Governmental Entities. *See* Exhibit 2, CTP’s First Amended Cross-Claim; and Exhibit 3, Cargill’s First Amended Cross-

¹ Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., George’s, Inc., George’s Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc. and Willow Brook Foods, Inc.

Claim. CTP and Cargill's proposed Cross-Claims against the Additional Governmental Entities are substantially identical to the Third Party Plaintiffs' claims against these Additional Governmental Entities.

PROCEDURAL HISTORY

1. On approximately March 9, 2005, Plaintiffs served CTP, Cargill and others with a purported Notice of Intent to Sue under the Citizen Suit provisions of the SWDA. The facially-deficient Notice contended that, among other things, CTP, Cargill and others had "contributed and are continuing to contribute to the handling, storage and/or disposal of solid and/or hazardous waste in a manner that may and does present an imminent and substantial endangerment to human health and the environment in the Illinois River Watershed located in northeastern Oklahoma and northwestern Arkansas (hereinafter the 'IRW')."

2. Thereafter, CTP and Cargill served their own Notices of Intent to Sue under the SWDA/RCRA and Oklahoma's Governmental Tort Claims Act, OKLA.STAT. tit. 51 § 157 ("GTCA") upon the City of Tahlequah, City of Watts and City of Westville.²

3. On June 13, 2005, Plaintiffs filed their original Complaint in this matter alleging that Defendants, including CTP and Cargill, caused injury to the Illinois River Watershed ("IRW"),³ including the biota, lands, water and sediments therein as a consequence of the practice of land applying poultry litter from poultry growing operations operated by independent farmers who contract with Defendants to grow poultry. Plaintiffs alleged nine counts against the CTP, Cargill and others, including claims for cost recovery under the Comprehensive

² CTP served its Notice of Intent to Sue upon City of Tahlequah on May 2, 2005. CTP served its Notice of Intent to Sue upon City of Westville on May 3, 2005. CTP served its Notice of Intent to Sue upon City of Watts on September 28, 2005. Cargill served its Notices of Intent to Sue upon City of Tahlequah, City of Westville, and City of Watts on September 28, 2005.

³ Complaint at ¶ 22.

Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9607(a); natural resource damages under CERCLA, 42 U.S.C. § 9607(f); public and private nuisance and nuisance *per se* under Oklahoma law and federal common-law; trespass under Oklahoma law; violations of Oklahoma statutes and regulations, namely 27A O.S. § 2-6-105, 2 O.S. § 2-18.1, 2 O.S. § 10-9.7, OAC §35:17-5-5, and OAC § 35:17-3-14; and unjust enrichment, restitution and disgorgement under Oklahoma law. Plaintiffs alleged they are entitled to recover past and future damages, restitution, environmental assessment, remediation, punitive damages, temporary and permanent injunctive relief, attorney’s fees and costs.

4. On July 29, 2005, Cargill, CTP and others served written notice setting forth their potential third-party claims predicated on the Plaintiffs’ Complaint on Adair County, Oklahoma, Cherokee County, Oklahoma, Delaware County, Oklahoma, and Sequoyah County, Oklahoma pursuant to GTCA.

5. On August 18, 2005, Plaintiffs filed their First Amended Complaint, which for the first time included a count based upon the SWDA.

6. On September 9, 2005, Judge Ellison entered an Order upon the unopposed Motion of Defendants/Third Party Plaintiffs allowing Defendants/ Third Party Plaintiffs until October 3, 2005, to answer or otherwise plead in response to the First Amended Complaint. (Dkt. No. 43.)

7. On October 4, 2005, CTP filed its Third Party Complaint setting forth its claims against City of Tahlequah and City of Westville based upon City of Tahlequah and City of Westville’s prior and existing operations and/or activities within the IRW. (Dkt. # 82).

8. On October 11, 2005, CTP, Cargill and others served their supplement written notice setting forth their potential third-party claims predicated on the Plaintiffs’ First Amended

Complaint on Adair County, Oklahoma, Cherokee County, Oklahoma, Delaware County, Oklahoma, and Sequoyah County, Oklahoma pursuant to SWDA/RCRA.

9. On March 15, 2006, CTP filed its Cross-Claim setting forth its claims against City of Watts based upon City of Watts' prior and existing operations and/or activities within the IRW. (Dkt. # 228).

10. On March 15, 2006, Cargill filed its Cross-Claim setting forth its claims against City of Tahlequah, City of Westville and City of Watts based upon City of Tahlequah, City of Westville and City of Watts' activities and operations within the IRW. (Dkt. #229).

PROPOSED AMENDMENTS AND ADDITIONAL PLEADINGS

CTP and Cargill hereby submit the following proposed pleadings that contain revisions to certain allegations and statements of claims to correct scrivener's errors, to reflect newly discovered information, and to clarify the bases for CTP and Cargill's theories of recovery:

1. CTP's First Amended Third Party Complaint against City of Tahlequah and City of Westville, (attached hereto as Exhibit "1");
2. CTP's First Amended Cross-Claim against City of Watts, Tahlequah Public Works Authority; Westville Utility Authority; Adair County; Cherokee County; Delaware County; and Sequoyah County (attached hereto as Exhibit "2"); and
3. Cargill's First Amended Cross-Claim against City of Tahlequah, City of Westville, City of Watts, Tahlequah Public Works Authority; Westville Public Works Authority; Adair County, Oklahoma; Cherokee County, Oklahoma; Delaware County, Oklahoma; and Sequoyah County, Oklahoma (attached hereto as Exhibit "3").

ARGUMENT AND AUTHORITY

**CTP AND CARGILL'S PROPOSED AMENDMENTS SERVE JUSTICE
AND WILL AID IN THE ADMINISTRATION OF THE CASE.**

In general, the federal courts look favourably on requests to amend pleadings, particularly where, as here, it is early in the proceedings, and the amendment will serve the complete adjudication of the controversy. Fed. R. Civ. P. 15 (a) states that leave to amend should “be freely given when justice so requires.” In *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Supreme Court held that in the absence of undue delay, bad faith or dilatory motive on the part of the movant, and if the “underlying facts or circumstances. . . may be the subject of relief,” the trial court should give plaintiff an opportunity test his claim. Likewise, CTP and Cargill should be afforded an opportunity to test their claims against the City of Tahlequah; City of Westville; City of Watts; Tahlequah Public Works Authority; Westville Utility Authority; Adair County, Oklahoma; Cherokee County, Oklahoma; Delaware County, Oklahoma; and Sequoyah County, Oklahoma.

CTP and Cargill’s request to amend and assert said claims are not motivated by any malevolent or dilatory objective. The proposed pleadings are entirely consistent with CTP, Cargill and the other Third Party Plaintiffs’ efforts to date in this lawsuit to pursue and preserve their rights against other potentially responsible parties as authorized by Fed. R. Civ. P. 14(a). The filing of CTP and Cargill proposed pleadings will not cause any prejudice to the parties. At this time, no scheduling order has been entered by the Court so no deadlines will be affected by the proposed pleadings.

CTP and Cargill’s proposed Amended Third Party Complaint and Cross Claims seek to clarify CTP and Cargill’s claims. Plaintiffs and certain Third Party Defendants have filed motions with the Court seeking the dismissal of the Third Party Complaint. (Plaintiffs’ Motion at Dkt. No. 247.) In their Response, the Third Party Defendants presented the Court with well-

founded arguments and relevant authorities in support of their causes of action, but they also acknowledged that to the extent any of their statements could be further clarified, they would be addressed in an Amended Third Party Complaint. (Dkt. No. 495.) Accordingly, CTP and Cargill's proposed amendments serve justice and the administration of the case by clarifying the allegations against the Third Party Defendants, which will likely resolve the controversies placed at issue by the Motions to Dismiss.⁴

The ends of justice are further served by permitting Cargill and CTP to file its proposed Third-Party Complaints against the Additional Governmental Entities. FED. R. CIV. P. 14 provides a mechanism for the CTP, Cargill and the other Third-Party Plaintiffs to join into the lawsuit others who may be liable to them for Plaintiffs' claims. CTP, Cargill and the other Third-Party Defendants should be afforded a full and fair opportunity to identify, join and prosecute their third-party claims in order to protect their interests, and to accomplish what the Plaintiffs refuse to do – address the dynamic, multi-faceted nature of this watershed environment to the fullest extent of the jurisdiction of this Court.

Allowing CTP, Cargill, and the other Third Party Plaintiffs to file their Amended Third Party Complaint will not cause any prejudice to the parties or result in the waste of judicial resources. At this time, no scheduling order has been entered by the Court so no deadlines will be affected by the amendment. Because Plaintiffs and all of the Additional Governmental Entities received notice of their exposure and potential joinder into this lawsuit by virtue of receiving the Third Party Plaintiffs' Notices of Intent to Sue under RCRA and GTCA, they

⁴ See *Alston v. Parker*, 363 F.3d 229, 236 (3rd Cir. 2004) (holding that “[d]ismissal without leave to amend is justified only on the grounds of bad faith, undue delay, prejudice, or futility.”)

cannot argue unfair surprise. *See Evans v. McDonald's Corporation*, 936 F.2d 1087, 1091 (10th Cir. 1991).

CONCLUSION

CTP and Cargill have shown the Court that their proposed amended pleadings are timely, will not prejudice the parties and will serve the interests of justice by aiding in the administration of the case and by allowing them to pursue their rightful claims against other potentially responsible parties. Accordingly, CTP and Cargill respectfully request the Court grant them leave to file the following amended and additional pleadings:

1. CTP's First Amended Third Party Complaint against City of Tahlequah and City of Westville, (attached hereto as Exhibit "1");
2. CTP's First Amended Cross-Claim against City of Watts, Tahlequah Public Works Authority; Westville Utility Authority; Adair County; Cherokee County; Delaware County; and Sequoyah County (attached hereto as Exhibit "2"); and
3. Cargill's First Amended Cross-Claim against City of Tahlequah, City of Westville, City of Watts, Tahlequah Public Works Authority; Westville Public Works Authority; Adair County, Oklahoma; Cherokee County, Oklahoma; Delaware County, Oklahoma; and Sequoyah County, Oklahoma (attached hereto as Exhibit "3").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 31st day of July, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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